Review of Part 5.6 of the *Criminal Code 1995*: Civil Society and Media Groups Roundtable

On Friday 2nd February 2024, the Independent National Security Legislation Monitor, Mr Jake Blight, met with several civil society groups and media organisations to discuss their preliminary views on the offences in Part 5.6 of the *Criminal Code Act 1995*.

The roundtable was attended by representatives from:

- Australia's Right to Know Coalition
- Civil Liberties Australia
- Human Rights Law Centre
- Law Council of Australia
- Media, Entertainment & Arts Alliance
- NSW Council for Civil Liberties

The discussion highlighted many areas of concern in the structure and the operation of the offences in Part 5.6. This record outlines some of the key issues discussed. This is a record of preliminary discussions only and any views expressed should not be attributed to individuals or organisations.

Executive Summary:

Some of the key themes from the discussions were:

- The breadth and uncertainty of the provisions in Part 5.6
- Observations about a 'culture of secrecy' across Australian government agencies and in this context a lack of trust in government and police/security agencies in particular
- A 'chilling effect' from secrecy laws on journalist and civil society activities
- The need for a free media to be recognised as an essential element of democracy and that whistle-blowers are a part of this ecosystem
- Concern about 'dealing with' offences, particularly for non-officials
- Possible issues of legal interpretation in any prosecutions and the breadth of definitions in Part 5.6

The main issues with Part 5.6

Issues with the 'dealing with' offence for non-officials

The definition of 'dealing with' was raised a number of times. Concerns were raised that the definition includes the mere 'receipt' and 'possession' of information. It was suggested that these thresholds place an undue burden on non-Commonwealth officers who have no formal relationship with the Commonwealth and no 'duty' to actively protect national security.

The group discussed examples of conduct which may be captured by the offences. One participant gave an example of a junior lawyer in a civil society organisation who is worried about the character of information that has been sent to them and then forwards it to their supervisor for advice on what to do next. That act would, in effect, 'deal with' the information and potentially be an offence with no applicable defence under s 122.5. It was suggested that the criminal law may not be the right tool to respond to this type of conduct. Some non-criminal mechanisms, such as the DSMA system in the United Kingdom, were discussed, though not necessarily supported.

When considering fault elements in 'dealing with' offences, the group discussed whether working as a journalist or civil society group involved or interested in national security matters could be, in and of itself, interpreted as an 'intention' to elicit or receive sensitive information on these topics.

Definition of 'information'

It was said that the definition of 'information' has historically been interpreted broadly and that the statutory definition in Part 5.6 is even broader. For example, 'information' is defined in s 90.1 to include opinions and false information. There was some discussion about how this and other definitions greatly expand the scope of the offences and how a very detailed analysis is needed to understand the scope of the offences. The offences in Part 5.6 were described by some as being excessively broad and impenetrable.

Role of the Attorney-General in consent and certification

There were differing views on the role of the Attorney-General in the prosecutorial process. Some suggested that the role of the Attorney-General in giving consent inherently politicises prosecutions. Others suggested that in the present legislation, the Attorney-General's discretion acts as a necessary check and balance. One suggestion for reform involved the introduction of a limitation period on the Attorney's consent which provides for deemed refusal after a set period.

Part 5.6 in operation

Some participants suggested that the way in which journalism is conducted today has changed significantly as some journalists are becoming increasingly unsure of the relevant legal parameters of their work. It was also suggested that some organisations are becoming risk-averse due to the uncertainty and cost of defending cases. It was posited that this chilling effect and the broader 'culture of secrecy' is a direct threat to democratic values and by extension, national security. The need for effective whistle-blower protections in Australia was discussed as being an essential requirement in order for secrecy offences to be justifiable.

The current AFP policies for handling sensitive investigations introduced after the *Smethurst* case were seen by some as providing little meaningful protection as they could be changed at any time.

What might a better Part 5.6 look like?

A harm-based offence

The group discussed concerns with the use of a 'security classification' as a deemed measure of harm. It was suggested that the classification system is not as accessible for non-officials compared to officials, and there was concern that the over-classification of documents may be occurring. Further, that a security classification is not a conclusive indicator of harm potentially caused, only that an official at some stage assigned a classification. The group discussed whether the introduction of an actual harm element was appropriate. Another suggestion involved the inclusion of a 'intention to cause harm' as a mental element, particularly for non-Commonwealth officers.

Cascading offences

The introduction of cascading offences was discussed – that is, offences that vary in severity for different groups of people based on different types of conduct. One suggestion was that a distinction could be drawn between 'causing harm' and 'likelihood of causing harm'. A temporal question was also raised about when the harm or likely harm would need to occur to make out this element. There was discussion of including a summary offence as a more proportionate response to disclosures.

Offences relating to non-Commonwealth officials

The group discussed the role of the public interest and the circumstances in which it was inappropriate to penalise non-officials for communicating official information. Some expressed a view that no offence should be absolute and that a court should always be able to consider the greater public

interest. The evidential burden of proof under the defence for 'persons engaged in the business of reporting news etc' was also discussed. Some participants posited that it should be shifted from the defendant to the prosecution in relation to proving that a person reasonably believed that engaging in that conduct was in the public interest.

The role of criminal and non-criminal sanctions

The group discussed the role of criminal and non-criminal sanctions in deterring and punishing unauthorised disclosures. It was suggested by some that administrative sanctions alone would be a sufficient response to most cases of unauthorised disclosure by officials and that criminal sanctions were only appropriate for truly harmful conduct.